the court dealt with the old Order 50 rule 3 where the language is similar to our Order 29 rule 2(1). Wilberforce, J. at page 861 construed this rule as follows:–

"The rule is not very accurately drafted but it does seem to me that it is sufficiently widely drawn to authorise the court to make an order for the delivery of any property or thing, including a document, to an expert for inspection in order that that expert may be able to provide full evidence on it. It seems to me that, for that purpose the court may authorise observation to be made of the document or an experiment to be tried. In my judgment there is power under the rule to make the order of the type here requested.

However, the question whether such an order should be made in any case is a matter of judicial discretion, and the order may be made on terms necessary to produce a just result.

In this case it is perfectly clear that the authenticity of this document is a crucial issue in the case, at any rate as regards the beneficial ownership of the shares which are referred to in the statement of claim."

In our view Order 29 rule 2(1) of the Rules of the High Court, 1980 confers power on the Judge to make the order as she did and it was not wrong in law for the Judge to have exercised her discretion under the circumstances.

As regards ground 8 of the memorandum of appeal, it should be noted firstly that section 157 of the Companies Act,1965 only directs that the books containing the minutes of the proceedings of any general meeting shall be kept by the companies at its registered office or its principal place of business and that such minutes shall be open for inspection to any member without charge. Any member shall be entitled under that section to be furnished within fourteen days on request in writing and on payment of the prescribed charge with the copy of any such minutes. Any company which contravenes this provision commits an offence.

In the present case it is obvious that there is a dispute over the shareholdings and the directorship of the companies. There is a dispute as to the control of the registered office of the companies. There is also the dispute as to who is the proper secretary of the companies. Apart from the first appellant and the first respondent there is only one other member of the companies. Under the circumstances it is obvious that the most appropriate repository for the documents would be the court. In our view section 157 of the Companies Act does not override or exclude the power of the court in appropriate cases to make an order (as done in this case) to protect the integrity of documents which will be relevant for the proper determination of a dispute.

Looking at the minutes of the trial Judge when the order was granted (pg. 214) and the reasoning contained in the judgment (pp. 218-219) it would seem to us that it was the documents which constituted the real subject of the order and not the common seals of the company. Thus the judgment sets out the reasoning as follows:–

"In the meantime, to maintain the status quo, the 1st and 2nd defendants have been declared to be persons to be in control and management of the 4th and 5th defendants subject to their submitting statement of accounts to the Court at the end of each month. But the issue as to who are the lawful directors of both companies is still there and will only be decided after the case have been heard and disposed of. It is with a view to preserving the integrity of all documents belonging to the 4th and 5th defendants that the applicants wish to have them deposited for safe-keeping with the Senior Assistant Registrar until after the issue over the directorship of both companies has been decided."

Therefore the order of the trial Judge should not have included the depositing of the common seals of the company so as to affect the day-to-day running of the affairs of the company. Subject to this variation in the order of the trial Judge the appeal is dismissed with costs.

Order accordingly.

Solicitors: *K.Y. Foo & Co.; Sri Ram, Zulkifly & Kumar; Philip Choong & Co.*

CHEAK YOKE THONG v. PUBLIC PROSECUTOR

[F.C. (Salleh Abas L.P., Abdul Hamid C.J. (Malaya) & Seah F.J.) May 4 & 5, 1984]

[Kuala Lumpur – Federal Court Criminal Application No. 4 of 1984]

Criminal Law and Procedure – Trial before Magistrate – Magistrate member of Judicial and Legal Service – Whether there could be bias or reasonable suspicion of bias.

Legal Profession – Lawyers briefing press on matters pending before the Court – Legal Profession (Practice and Etiquette) Rules, 1978, rr. 45, 46 & 47.

In this case the applicant had been charged with the offence of attempted robbery with a deadly weapon and

produced before a Magistrate for trial. An application was made asking the Magistrate to disqualify himself on the ground that the applicant feared that the Magistrate would be biased because he is a member of the Judicial and Legal Service, of which the Attorney-General, who is the Public Prosecutor, is the head. The application was refused but in a similar application in another case the same Magistrate had allowed the application and disqualified himself. The applicant appealed to the High Court against the dismissal of his application and the appeal was dismissed, see [1983] 1 M.L.J. 311. He then applied to refer the following question for the opinion of the Federal Court – "Whether the fear on the applicant's part that the learned Magistrate being a member of the Judicial and Legal Service of which the Attorney-General is the highest ranking officer, having control of the learned Magistrate's career in the said service was reasonable to hold that there could be bias or there was reasonable suspicion of bias whereby it was reasonable to say that in these circumstances justice may not seem to be done".

Held: (1) the fear of the applicant that the Magistrate would be biased against him, whether the fear is justified or not, cannot be a sufficient reason for the Magistrate to disqualify himself from hearing the case. The applicant must show by evidence that the adjudicating officer or the tribunal is in fact biased or is likely to be so;

(2) it is not factually or legally correct to say that the Attorney-General has control of the learned Magistrate's service;

(3) in our system not only is there no room to doubt the existence of legal bias, but also our law of procedure and evidence meets the required standard designed to ensure fair and impartial trial and to prevent miscarriage of justice. There is therefore no substance in the application;

(4) the answer to the question posed is in the negative and the trial should commence without further delay.

Obiter dictum: Lawyers should refrain themselves from briefing the press on matters pending before the court, especially when they have not been properly before it.

Case referred to:

(1) *The Judges* v. *Attorney-General for Saskatchewan* (1937) 53 T.L.R. 464.

FEDERAL COURT.

A.K.F. D'Cruz (*Yusoff Khan* and *S. Seeralan* with him) for the applicant.

Lim Beng Choon (Senior Federal Counsel) for the respondent.

Cur. Adv. Vult.

Salleh Abas L.P. (delivering the Judgment of the Court): This is an application by Cheak Yoke Thong, under section 66(1) of the Courts of Judicature Act, 1964, for leave to refer a number of questions for the Federal Court's determination.

Cheak was charged with an offence of attempted robbery with deadly weapon under sections 393 and 397 of the Penal Code, an offence which was alleged to have been committed by him jointly with one Wong Kim Seong. His trial was due to be held on January 13, 1984 and on that date when the case came before the Magistrate, Seremban, Encik Zainal bin Abdul Rahman, his counsel made an application asking the Magistrate to disqualify himself from hearing the case on the ground that Cheak feared that the Magistrate would be biased because the Magistrate is a member of the Judicial and Legal Service of which the Attorney-General, being the Public Prosecutor at whose instance the charge against Cheak was preferred, is the head.

The Magistrate refused the application. But, on the day before, that is on January 12, 1984, upon a similar application in another case the same Magistrate allowed the application and disqualified himself. Cheak appealed to the High Court against the dismissal of his application and the appeal was heard by Hashim Yeop A. Sani, F.J. The learned judge dismissed the appeal and held that the application being a procedural matter, the decision of the Magistrate could not be a subject matter of an appeal under section 307(i) of the Criminal Procedure Code. However, since the matter has created some degree of uncertainty amongst judicial officers and some measure of publicity in the press, he proceeded to review the case with a view to exercising his revisionary power. In the end he came to the conclusion that there was no question of actual bias because the trial has not yet started and concluded, nor was there any likelihood of bias. We have read his judgment and with respect we wholly agree with it.

In his application for leave before us Cheah framed no less than seven questions he would like us to determine. Looking at these questions we are of the opinion that they are nothing more than mere repetitions of his grounds of appeal put forward before the court below. These questions are directed to establish a ruling that the Magistrate is biased and, therefore, should disqualify himself because the Attorney-General, being the Public Prosecutor, is the head of the Judicial and Legal Service of which the Magistrate is a member. This is amplified in paragraph 5 of the affidavit of Cheak's solicitor who stated:

"... the Appellant feared bias on the part of the court as the learned Magistrate is a member of a public service of which the Head of Service is the Attorney-General, who is the Public Prosecutor, in whose instance, the charge against the applicant was preferred."

At our suggestion counsel reframed the seven questions to the following single question:

"whether the fear on the applicant's part that the learned magistrate being a member of the Judicial and Legal Service of which the Attorney-General is the highest ranking officer, having control of the learned magistrate's career in the said Service was reasonable to hold that there could be bias or there was reasonable suspicion of bias whereby it was reasonable to say that in those circumstances justice may not seem to be done."

We allowed the leave and immediately thereafter heard the submission.

From the above question, two issues are raised. First, whether Cheak's fear of the possibility of the Magistrate being biased, whether the fear be justified or not, is a sufficient reason for the Magistrate to disqualify himself from hearing the case. Secondly, whether the assumption upon which the question is framed in that the Attorney-General is "having control of the learned Magistrate's service" is factually or legally correct. As to the first issue, surely no one could come to court and seek for the dismissal of the case against him or for a trial by another tribunal just because he said that the adjudicating officer would be biased against him. On this ground alone the application should be turned down. His fear alone is not sufficient. He must, however, show by evidence that the adjudicating officer or the tribunal is in fact biased or is likely to be so. Hashim Yeop A. Sani, F.J. had examined this question and we see no reason to differ from his view. As to the second issue, this too was dealt with by the learned judge and we agree with him that the assumption is erroneous both in fact and in law.

The law on bias which disqualifies an adjudicating officer from an adjudication is summarised in the Latin maxim *"nemo debet esse judex in propria causa"*, meaning no one should be judge in his own cause. This time-honoured principle is based on the desirability of maintaining public confidence and respect in the administration of justice. Thus, no one who is himself a party to the proceedings or who has any direct pecuniary interest in the result is qualified to adjudicate in those proceedings. But the court will not disqualify him merely because of his words, deeds or his association with a party who is instituting or defending the proceedings before him unless the circumstances of the case show that there is a real likelihood or reasonable suspicion of bias (*de Smith's*, 4th ed. p.251).

In this case it is clear that Encik Zaini, the Magistrate, has no pecuniary interest or personal gain to benefit from the trial of Cheak. He was not concerned with the outcome of the trial as to whether the prosecution will succeed or fail. He was there to do a job and to hold a trial in accordance with the established procedure and evidence. Thus, there cannot be any bias at all.

What about the Attorney-General being the head of the Judicial and Legal Service? Would this fact and his position vis-a-vis members of Service per se constitute a legal bias?

The learned Judge who heard the appeal held that the Attorney-General is not the head of the Judicial and Legal Service, that it is not his decision alone which decides on the fate of the Magistrate's career in the government service because the Magistrate together with all the other officers in the Judicial and Legal Service including the Attorney-General himself is under the jurisdiction of the Judicial and Legal Service Commission. We see no reason to disagree with the opinion so expressed.

We wish, however, to add that even assuming that the Attorney-General is the head of the Service, a term which is not known to the Constitution but conveniently used in the public service sector for administrative expediency, under no circumstances could the Magistrate be held to be under the Attorney-General, nor could he be said to be a party to the prosecution. The Magistrate is not appointed by the Attorney-General but appointed by the Ruler of the State (or in the case of Federal Territory by Yang di-Pertuan Agong) on the advice of the Chief Justice to whom the Magistrate is responsible and under whose administrative control he is placed (See sections 78 and 79 of the Subordinate Court Act). His transfer from one judicial post to another judicial post is completely under the authority of the Chief Justice, and as regards his transfer from a judicial post to a legal post under the aegis of the Attorney-General, this is a matter of consultation and agreement between the Chief Justice and the Attorney-General. Similarly, as regards his promotion and advancement in the Service, the confidential report on the Magistrate for this purpose is written by a Judge of the State where the Magistrate is currently or previously posted and this report is subject to the comments or recommendations by the Chief Justice for the ultimate consideration of the Judicial and Legal Service Commission. All the members of the Commission are judges including the two Chief Justices (of Malaya and

Borneo), except for the Chairman and the Attorney-General, the chairman being the Chairman of the Public Services Commission. Thus, under no circumstances could it be said that the Magistrate is under the influence of the Attorney-General and therefore part of the prosecution so as to give ground to any one to infer the so-called "inherent or legal" bias as opposed to factual bias.

The Attorney-General today is a civil servant. He belongs to the Judicial and Legal Service and being the highest paid officer in the Service it is natural that he assumes the leadership in the Service and is thus referred to as head of the Service for better or for worse. But this fact alone does not create an "inherent or legal bias" which Cheak wants the Magistrate to disqualify himself from hearing his case. Whether one likes it or not the present position of the Attorney-General in the system of criminal justice is perfectly in accord with the law and the Constitution. Being a member of the Judicial and Legal Service, the Attorney-General is a civil servant, and holds office – just as other officers and Magistrates do – during pleasure of the Yang di-Pertuan Agong, meaning his appointment is terminable by the Yang di-Pertuan Agong and his service is terminable by the Commission subject to the safeguards provided for in the Constitution. These facts are all the legal and constitutional realities and we cannot see how a situation which is firmly established by law and the Constitution can be said to be a legal bias.

As regards actual or likelihood of bias, the learned Magistrate said in his grounds of judgment that although he feared the Attorney-General, he gave an assurance that he would never give in to the Public Prosecutor's convenience and that he would decide the case according to its merits and do justice according to the rule of law. We see no reason not to accept his assurances, unless he did not mean what he said. After all the fear that he entertained is a self-induced and misguided fear. There is no reason at all for him to be afraid. In fact when we look at his judgment, we are left in no doubt that the Magistrate was a courageous person especially when he revealed his dissatisfaction and that of his colleagues and the low morale in the Judicial and Legal Service. To have alleged that the Attorney-General is responsible for this state of affairs and usurping powers requires a person of very great courage indeed.

Magistrates and Presidents and other officers in the Judicial and Legal Service may have certain views and feelings towards their service, and that is natural, but such views and feelings are completely a domestic affair between them and those who have to run the service. No one should be allowed to take advantage of it especially to exploit it in the court of law to stop a trial. Nor should the Magistrates allow themselves to be used by others for the purpose. We think the judgment of Hashim Yeop A. Sani F.J. should have laid the matter to rest. To continue raising the issue in this application only serves to create and continue the suspicion in the minds of the innocent public that there is no fair trial in the subordinate courts in this country because of the position of the Attorney-General vis-a-vis the legal and judicial officers. This, in our view, is highly mischievous and irresponsible. In fact the brunt of the criticisms levied against the courts' rulings in refusing disqualification are directed against the Attorney-General personally. Such tactic is to be deplored because the court is neither a forum to advocate changes in the appointment of officers of the realm nor even changes in the law. Whilst counsel has every right to urge any submission on behalf of his client and he can do so without fear or favour, certainly that right is not an absolute one. It must be limited in terms of honesty, sincerity, propriety and decency. It is certainly an abuse of process to make an innocent Magistrate, raw and inexperienced, a mere pawn with which attacks on the Attorney-General are mounted. Early trial is what our system of criminal justice is striving for. Yet how is this application going to help achieving it? From the records the case is already five years old. Thus, it appears that not only the Magistrate but also the accused have been used to further the interests of those who have disagreement with the Attorney-General. This is serious and we only hope that our impression of abuse of process is not true.

Reverting to the law, even if the current system of appointment of Magistrates and Presidents of Sessions Courts and the appointment of Attorney-General and other officers is regarded as defective and not conducive towards impartiality in the administration of justice (which, in our view, is far from being so) until it is changed, the system must go on. If the submission of Cheak is accepted it will mean that all Magistrates and Presidents of Sessions Courts in this country will have to disqualify themselves from hearing any criminal prosecutions at the suit of the Public Prosecutor. Such a situation will cause a failure of justice as the whole administration of justice in the subordinate courts will come to a standstill. The law will

not be so powerless as to allow the situation to develop. The doctrine of necessity can always be invoked to prevent it from happening. Just as ex necessitate the Yang di-Pertuan Agong is authorized by the Constitution to declare a state of emergency when he is satisfied that an emergency situation exists, similarly ex necessitate the magistrate is competent and obliged to adjudicate even though he is *prima facie* disqualified for interest or bias, if declining to do so, would lead to failure of justice. There are many cases and instances in other common law jurisdictions in which the doctrine of necessity was successfully invoked and applied. To quote as an example, the Judges of Saskatchewan were held to be under an obligation *ex necessitate* to judge upon the constitutionality of a legislation rendering them liable to pay income tax on their salaries. (*The Judges* v. *Attorney-General for Saskatchewan.*[1]). But the doctrine must not be used to camouflage an arbitrary power. While it can be invoked to prevent failure of justice it must not be used as an affront of justice. This means that so long as the trial or adjudication is held in accordance with the recognized procedure which is designed to achieve impartiality and fair trial, no disqualification *ex necessitate* can vitiate that trial (*de Smith,* 4th ed. pp.251 and 276).

In our system not only is there no room to doubt the existence of legal bias, but also our law of procedure and evidence meets the required standard designed to ensure fair and impartial trial and to prevent miscarriage of justice. We, therefore, see no substance in this application.

There is, however, one other matter we would like to comment here, and that is this: The filing of this application to the Federal Courts was accompanied by such a fan-fare in the local newspapers (please refer to *"The Star"* dated April 10, 1984) that we cannot help concluding that the details of the case reported in the press could not be otherwise than the result of prior interview between the solicitors and newspaper reporters. We view this very seriously as the practice only serves to mislead the public and also embarrasses the court. In this case it was in the press that the several questions were posed for the Federal Court's determination whilst the application was not yet brought to our attention. We think lawyers should refrain themselves from briefing the press on matters pending before the court, especially when they have not been properly before it. We would like to remind them of rules 45, 46 and 47 of the Legal Profession (Practice and Etiquette) Rules 1978, which seem to us to be relevant in the circumstances of this case. We hope that the rules are not dead letters.

Our answer to the question is in the negative and we order that the trial must commence without further delay.

Seah F.J. (giving supporting judgment): I agree with the judgment which has just been delivered by the learned the Lord President. I would, however, like to add a few words. Speaking generally, the conduct of criminal trials in Malaysia is regulated by the Criminal Procedure Code (as amended) (F.M.S. Cap. 6) and section 439 enacts that "No Magistrate shall, except with the permission of the High Court to which an appeal lies from his court, try or commit for trial any case to or in which he is a party or personally interested". And it is expressly provided by section 417 that whenever it is made to appear to the High Court that a fair and impartial inquiry or trial cannot be had in any court subordinate thereto, the High Court may order the inquiry or trial to be heard by another criminal court of equal or superior jurisdiction. If the application is made by accused person, it should be by way of motion and be supported by affidavit (see section 418). In my opinion, such a procedure should be followed in future cases if there is any complaint against the alleged partiality or bias of the trial Magistrate or President of the Sessions Court.

Order accordingly.

Solicitors: *Mahadevi Ganeshmurugan & Co.*

GOVERNMENT OF THE STATE OF NEGERI SEMBILAN & ANOR. v. YAP CHONG LAN & 12 ORS. LESCO DEVELOPMENT CORPORATION SDN. BHD. v. YAP CHONG LAN & 12 ORS.

[F.C. (Abdul Hamid C.J. (Malaya), Wan Suleiman & Abdoolcader F.JJ.) June 7 & 22, 1984]

[Kuala Lumpur – Federal Court Civil Appeals Nos. 86 and 101 of 1984]

Land Law – State land occupied on permission given by Collector of Land Revenue – Land subsequently alienated to development company – Validity of alienation – Portions of land consisting of vegetable garden reserve – Discretion of court in making declaration of invalidity – Whether persons occupying the land have acquired any equitable right or interest to remain on the lands allocated to them – Application of doctrine of equitable estoppel – Public law – National Land Code, ss. 5, 48, 62, 76 & 78.

Practice & Procedure – Proceedings under the National Land Code – Whether State Government a proper party – National Land Code, ss. 12 & 16.